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No.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1995

Loralee and Charles Vasquez,

Petitioners,

vs.

Lt. Charles Hernandez, Officers Robert Kierny, Jackie Lee Dukes, Daniel Dimenna, Joseph A. Sirgedas, Officer William Pfieffer, Stephen Gratace, Supervisor Jerry Erjavec, Anthony Iniquez, Howard Hatton, and Lt. Bruno Jankausas,

Respondents,

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Are Due Process Rights securing the right to pursue legal redress for claims which have a reasonable basis in law or fact violated at the time that state actors conspire to interfere with an individual's access to the courts and what factors should be considered by courts in analyzing whether state actors' intentional interferences with access to the courts amounts to an injury worthy of constitutional protection?

PARTIES TO THE PROCEEDING

In accordance with Supreme Court Rule 14.1(b), the names of all the parties in this case appear in the caption of the cover of this Petition.

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On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

The petitioners, Charles and Loralee Vasquez, respectfully pray that a *writ of certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in the above entitled proceeding on September 12, 1995.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 60 F.3d 325 and is reprinted in the appendix hereto. The memorandum decisions for the United States District Court for the Northern District of Illinois are not reported. They are reprinted in the appendix hereto. The September 12, 1995 Order of the United States Court of Appeals for the Seventh Circuit denying rehearing and denying the suggestion for rehearing *en banc* is reprinted in the appendix hereto.

JURISDICTION

Invoking jurisdiction under 42 U.S.C. Section 1983 and Section 1985, the Petitioners brought this suit in the Northern District of Illinois. On October 27, 1992, the District Court granted Defendants' Motion to Dismiss Petitioners' Section 1985 claims. On May 17, 1994, the District Court granted Defendants' Summary Judgment as to the Section 1983 claim. On Petitioners' appeal, the Seventh Circuit entered judgment on July 14, 1995 affirming the order of the District Court. Petitioners' request for rehearing with a suggestion for

rehearing *en banc* was denied on September 12, 1995. The jurisdiction of this court is invoked pursuant to 28 U.S.C. Section 1254 (1).

STATUTES INVOLVED

42 U.S.C. Section 1983: Civil Action for Deprivation of Right:

> Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District Columbia.

Constitution of the United States, Amendment I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition The Government for a redress of grievances.

Constitution of the United States, Amendment XIV

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are Citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Loralee and Charles Vasquez filed an action in the United States District Court for the Northern District of Illinois against the Respondents invoking 42 U.S.C. Section 1983 and 42 U.S.C. Section 1985. They alleged that the actions of the Respondents violated their constitutional right to pursue legal redress for claims which have a reasonable basis in law and fact.

On July 27, 1991, petitioner Loralee Vasquez, while in her home, was shot in the ear by a bullet fired by one of several off-duty police officers who were attending a Super Bowl Party at the residence of Respondent Charles Hernandez. Hernandez's residence was situated directly across the alley which ran behind the Petitioners' home. The Vasquezes immediately called the Cicero Police Department for help and various members of the police force were dispatched in response to the call. Respondent Pfieffer was the first police officer to arrive at the Vasquez residence and upon inspection he retrieved a bullet slug from the floor. After the arrival of other officers, another spent bullet

was found lodged in the wall of the Vasquez's garage and two more bullets were found in the garage door. The Vasquez's garage was directly opposite the Hernandez residence.

As he was examining the exterior of the Vasquez home, Respondent Pfieffer was approached by Respondent Hernandez, an off-duty Cicero Police Officer. Hernandez suggested to Pfieffer that the shooting may have been intended for him because he had been having some trouble with gang members. Respondent Pfieffer then returned to the Cicero Police Station and gave the two bullets to Respondents Iniquez and Hatton. Iniquez and Hatton went to Hernandez's house and spoke to Hernandez while the Super Bowl Party was still in progress. While at Hernandez's residence, Iniquez and Hatton had food and drink with the remaining revelers. Iniquez observed that Hernandez appeared to have been inebriated. Although the bullet entry holes in the garage door were far above the level of an automobile window, the detectives advised the Vasquezes that the bullets were probably fired by gang members in a drive by shooting aimed at Hernandez's home but mistakenly fired into their home. The petitioners were provided with no further information by the Cicero Police Department and though the case remained officially "open" there was no further investigation of the matter by the Cicero Police Department.

Approximately four months later, the Vasquezes began to get an inkling of the true nature of the shooting when agents of the Federal Bureau of Investigation appeared at their home to interview them about the shooting and do scientific studies of the ballistic trajectories. The F.B.I., the Illinois State Police and the Cook County State's Attorney's Office had created a Task Force to investigate the shooting. The Task Force concluded that in the midst of the Super Bowl Party, Hernandez and two other off-duty Cicero police Officers, Respondents DiMenna and Sirgedas, went into Hernandez's backyard, draped a piece of

tarp over the door of a children's playhouse and affixed a shooting target to the tarp with a picture of Saddam Hussein. They then commenced to fire live 9 millimeter ammunition at the target utilizing combat shooting stances. One of the bullets apparently crashed through the window of the petitioners and struck Loralee Vasquez.

Based on the information of newspaper accounts of the Task Force, the Petitioners filed their action alleging that the Respondents conspired to cover up the shooting and impede the investigation. The Respondents moved for summary judgment claiming that there was not sufficient evidence to support a finding of conspiracy nor sufficient evidence to support a finding that the Petitioners' right of access to the courts was abridged. The District Court conceded that there was sufficient evidence to support a finding of conspiracy. However, the District Court granted summary judgement holding that the Vasquezes failed to sufficiently demonstrate that the alleged conspiracy deprived them of their right of access to the courts.

REASONS FOR GRANTING THE WRIT

The decision of the Seventh Circuit demands review because the majority opinion indirectly encourages state actors to conceal the circumstances related to unlawful acts committed under the color of state law. Further, the majority opinion effectively insulates state actors from liability for claims based upon conspiracy to deny access to the courts by placing the onerous burden on those victimized by intentional misconduct to demonstrate precisely how they have been prejudiced by such misconduct.

The record in the present case overwhelmingly demonstrates that the Respondents obstructed any *bona fide* investigation of

the events leading to the shooting of the Petitioner. For a period of four months, the Petitioners were literally "in the dark" as to the true nature of the events of January 27, 1991 due to the intentional interference and obstruction of the Respondents. Thus, the Petitioners tort claim was rendered useless for months because of the improper actions of the defendants. Nonetheless, the Seventh Circuit contends that the Vasquezes did not suffer constitutional injury because, although delayed, the Vasquezes were ultimately able to pursue their tort action before the statute of limitations expired.

Such an analysis is arguably at odds with the Fifth Circuit's decision in Ryland v. Shapiro, 708 F.2d 967 (5th Cir. 1983). In Ryland, the plaintiffs alleged that police officials conspired to hinder police investigations and to cover up facts about the death of their daughter for nearly a year. The Fifth Circuit found constitutional harm from delay in the prosecution of an action caused by the misconduct of state officers:

> "Delay haunts the administration of justice. It postpones the rectification of wrong and the vindication of the unjustly accused. It crowds the dockets of the courts, increasing the costs for all litigants, pressuring judges to take short cuts interfering with the prompt and deliberate disposition of those causes in which all parties are diligent and prepared for trial, and overhanging the entire process with the pall of disorganization and insolubility. But even these are not the worst of what delay does. The most erratic gear in the justice machinery is at the place of fact-finding, and possibilities for error multiply rapidly as time elapses between the original facts and its judicial determination.

Ryland v. Shapiro, 708 F.2d at 974 (quoting Rherquark v.

Shaw, 628 F.2d 397, 303-304 (5th Cir. 1980).

Thus, Ryland stands for the proposition that constitutional injury is not dependent merely upon a complete loss of a cause of action. The reasoning of the Seventh Circuit opinion contradicts Ryland in effectively requiring those stating a claim for a denial of access to courts to allege a total loss of a cause of action.

Most disturbing, however, is that such a requirement indirectly encourages police to conceal the circumstances related to unlawful acts committed under the color of state law and other deprivations of state rights which Section 1983 was designed to remedy. Under the analysis employed by the Seventh Circuit, assuming a police officer violates the law, a successful cover-up would free the police officer from his misconduct. If, however, an attempted cover-up fails, the police officer is liable only for his original wrongdoing. Importantly, the cover-up would not expose him to any additional violations and he runs no greater risk of liability.

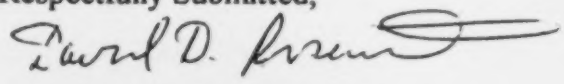
In terms of risk and reward analysis, the majority decision unwittingly increases the possibility that police officers will attempt to cover-up their misconduct. Such a result frustrates one of the fundamental purposes of Section 1983. The purpose of Section 1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails. Wyatt v. Cole, 504 U.S. 158, 161 (1992)(citing Cary v. Piphus, 435 U.S. 247, 254-257, 98 S.Ct 1042, 1047- 49 (1978). Nor can the analysis of the majority opinion be squared with the compelling concern of the general public and each and every citizen that police officers meet their constitutional duty not to conceal wrongs perpetrated by co-employees acting under the color of state law. See Webster v. City of Houston, 735 F.2d 838 (5th Cir. 1984).

Finally, in characterizing the plight of the petitioners as insignificant, the Seventh Circuit specifically relies upon the absence of allegations of prejudice to the petitioners because of the conspiracy. Besides the fact that the petitioners have alleged specifically how they have been prejudiced by the conspiracy of the Respondents, (indeed the conspiracy of silence continues to this day)the Seventh Circuit's prejudice requirement places an onerous burden on those victimized by police misconduct to demonstrate exactly how they have been prejudiced. Thus, in the instant case, the petitioners are saddled with the burden of identifying the potential witnesses that the police did not interview, the evidence that was lost(or destroyed), and any other cracks in the fact-finding process as a result of the Respondents' iniquitous behavior. Given the very nature of conspiracies and the difficulties of victims to know the full extent of harm done to them, this burden is not only great, but probably insurmountable absent a confession by one of the conspirators. The practical consequence of the decision therefore is to insulate state actors from liability. Therefore, as in the instant case, where there is evidence of a deliberate government conspiracy to intentionally impede justice, the showing of prejudice necessary for a finding of constitutional injury should be minimal. See Hessel v. O'Hearn, 977 F.2d 299, 303-304 (7th Cir. 1992(doctrines such as *de minimis non curat lex* may be relevant to due process inquiry, but have little if any application to deliberate wrongs).

CONCLUSION

For all these reasons, the Petition for certiorari should be granted.

Respectfully Submitted,



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APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 94-2447

LORALEE VASQUEZ and CHARLES VASQUEZ,

Plaintiffs-Appellants,

v.

LT. CHARLES HERNANDEZ, OFFICERS ROBERT KIERNEY, JACKIE L. DUKES, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 91 C 4008—George M. Marovich, *Judge.*

ARGUED FEBRUARY 9, 1995—DECIDED JULY 14, 1995

Before BAUER and COFFEY, *Circuit Judges,* and CRABB, *District Judge.**

BAUER, *Circuit Judge.* Loralee and Charles Vasquez brought this action under 42 U.S.C. §§ 1983, 1985, against several members of the Cicero Police Department and one member of the Cicero Fire Department. The district court dismissed the section 1985 claim on the pleadings and then granted the defendants' motion for summary judgment on

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* The Honorable Barbara B. Crabb, Chief Judge of the United States District Court for the Western District of Wisconsin, is sitting by designation.

the section 1983 claim. At the heart of the district court's summary judgment decision was its finding that the Vasquezes suffered no constitutional injury. The Vasquezes challenge that finding and appeal the court's decision.

January 27, 1991, known unofficially as Super Bowl Sunday, was a bad day for Loralee Vasquez. While in her home in Cicero, Illinois, she was struck in the ear by a stray bullet. Officer William Pfieffer of the Cicero Police Department was the first police officer to respond to the Vasquezes' call for help. Upon arriving at the Vasquez residence, he inspected the room where the shooting occurred and retrieved a bullet slug from under a table. Pfieffer then called his fellow officers for backup.

Among the next wave of officers to arrive at the scene was Sergeant Erjavec. He and Pfieffer proceeded to examine the exterior of the Vasquez home around the window through which the bullet had entered. They discovered one bullet hole in the side of the Vasquezes' garage and two more in the garage door. At that time, Pfieffer was approached by Charles Hernandez, an off-duty Cicero police officer and a neighbor of the Vasquezes. When told about the shooting, Hernandez suggested that the bullets may have been intended for him because he had been having trouble with some gang members.

After completing his search of the premises, which revealed a second gun shell in the Vasquezes' garage, Pfieffer talked to some of the neighbors. Those who were at home admitted to hearing the shots but had seen nothing that might lead police to the identity of the shooter. Pfieffer concluded that the explanation proffered by Sergeant Hernandez was the most likely. Pfieffer returned to the police station where he met with Detectives Howard Hatton and Anthony Iniquez. After briefing the detectives on the shooting, Pfieffer turned over the bullets to them.

Later that evening, Hatton and Iniquez followed up on Pfieffer's preliminary investigation. They interviewed the Vasquezes and inspected the vicinity of the shooting. Then they proceeded to Hernandez's house where they asked

him questions about the shooting. Iniquez believed Hernandez to be inebriated. Upon returning from their inquiry, Hatton and Iniquez completed their reports on the shooting. They placed the two shells in an evidence envelope and stored the envelope in Iniquez's desk drawer. Though the case remained officially "open," there was little activity or investigation of the matter by the Cicero police for over four months.

In the interim, the FBI, the Illinois State Police, and the Cook County State's Attorney's Office collaborated to establish a Task Force for purposes of investigating the Vasquez shooting. Their lengthy and detailed inquiry consisted of numerous interviews, exhaustive examination of physical evidence, and use of a sophisticated laser trajectory system designed to replicate the shooting and to locate its source.

The Task Force reached the following conclusion: In the midst of hosting a Super Bowl party at his house, Hernandez and two other off-duty police officers, Joseph Sirgedas and Daniel Dimenna, went out to Hernandez's backyard. In the backyard, a piece of tarp was draped over the door of a children's playhouse. A shooting target was affixed to the tarp with a picture of Saddam Hussein tacked to the center of the target. Witnesses observed Hernandez and two or three other men in the yard. Two of the men were in a combat shooting stance with their arms pointed towards the target. Guests at the party acknowledged hearing gunshots during halftime of the Super Bowl. Ballistics tests of the shells found in the Vasquezes' home confirmed that they could have been fired by either Sirgedas's or DiMenna's nine millimeter gun.

Based on the Task Force's findings, Hernandez, Sirgedas, and DiMenna were charged with violating provisions of the Cicero Code of Ordinances and General Orders. The relevant provisions govern the use and carry of firearms by off-duty police officers. Detective Iniquez was also charged with violating the Cicero Code for his failure to submit the bullets to the property clerk in accordance with prescribed procedure. Hernandez, Sirgedas, and DiMenna

were suspended for thirty days. Iniquez received a five-day suspension.

Upon the conclusion of the Task Force's investigation, the Vasquezes filed this action. The complaint alleged wrongdoing on the part of two sets of defendants. The first group of defendants is comprised of the various off-duty police officers present at Hernandez's home on the day of the shooting who were either aware of or took part in the backyard shooting.[1] The second group of defendants consists of the on-duty police officers who were involved in the investigation of the shooting and who, according to the complaint, conspired with the first group of defendants to cover up the shooting and impede the investigation.[2] The district court granted all the defendants' motions for summary judgment.[3] We affirm.

To successfully withstand a defendant's motion for summary judgment, a plaintiff suing under 42 U.S.C. § 1983 must demonstrate that with respect to the essential elements of the action, there is a genuine dispute as to a material and outcome-determinative fact. *Celotex Corp. v.*

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[1] This group consists of Charles Hernandez, Robert Kierney, Jackie Lee Dukes, Daniel DiMenna, Joseph Sirgedas, and George Janecek.

[2] Comprising the second group of defendants are William Pfieffer, Stephen Gratace, Jerry Erjavec, Anthony Iniquez, Howard Hatton, and Bruno Jankauskas.

[3] Because the district court's order failed to grant summary judgment in favor of the defendant Jackie Lee Dukes, we requested that the parties address the issue of whether we had jurisdiction over this appeal. In the interim, the district court issued a *nunc pro tunc* order clarifying its earlier order and granting summary judgment in Dukes's favor. A district court may issue an order of clarification *nunc pro tunc* after a notice of appeal has been filed without robbing this court of its jurisdiction. *Local 1545, United Mine Workers of America v. Inland Steel Coal Co.*, 876 F.2d 1288, 1291-92 n.4 (7th Cir. 1989). Jurisdiction is, therefore, intact. Nevertheless, the Vasquezes have moved to dismiss Dukes from this appeal, and since there is no objection to such a dismissal, the motion is granted.

Catrett, 477 U.S. 317, 322 (1986). In deciding on appeal whether a grant of summary judgment was appropriate, we review the evidence and draw reasonable inferences in a light most favorable to the nonmoving party, in this case, the Vasquezes. *Cuddington v. Northern Indiana Public Serv. Co.*, 33 F.3d 813 (7th Cir. 1994).

Relief under section 1983 is available to a plaintiff who can demonstrate that a person acting under color of state law deprived the plaintiff of a right, privilege, or immunity secured either by the Constitution or by federal law. The first step in analyzing a section 1983 claim is to identify the specific constitutional injury. *Kernats v. O'Sullivan*, 35 F.2d 1171, 1175 (7th Cir. 1994). The Vasquezes claim that the defendants' conspiracy of silence deprived them of their constitutional right to seek judicial relief for their injury.

The right of individuals to pursue legal redress for claims which have a reasonable basis in law and fact is protected by the First and Fourteenth Amendments. *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741 (1983); *Bell v. City of Milwaukee*, 746 F.2d 1205, 1261 (7th Cir. 1984). A corollary of this right is that efforts by state actors to impede an individual's access to courts or administrative agencies may provide the basis for a constitutional claim under 42 U.S.C. § 1983. Judicial access must be "adequate, effective, and meaningful," *Bounds v. Smith*, 430 U.S. 817, 822 (1977), and therefore, when police officers conceal or obscure important facts about a crime from its victims rendering hollow the right to seek redress, constitutional rights are undoubtedly abridged. *Bell*, 746 F.2d at 1261; *see also Stone v. City of Chicago*, 738 F.2d 896 (7th Cir. 1984); *Ryland v. Shapiro*, 708 F.2d 967 (5th Cir. 1983).

Bell provides a stark example of how police conduct can infringe upon the right of access. In that case, Daniel Bell, a black man, was shot and killed by a Milwaukee police officer named Thomas Grady. *Bell*, 746 F.2d at 1215. After the shooting, Grady planted a knife in Bell's hand. Grady and his partner, Louis Krause (who had witnessed the in-

cident), then falsely claimed that Grady had shot Bell in self-defense after Bell had threatened Grady with the knife. *Id.* Bell's father filed a wrongful death action against the officers. The officers continued to assert that the shooting was in self-defense. The case first resulted in a mistrial and then, at the urging of the judge, was settled for an amount so meager, Bell's father never cashed the City's check. *Id.* at 1223.

The true circumstances surrounding Bell's death were not revealed until twenty years later when Krause admitted that he and Grady had covered up the truth about Bell's death. Bell's survivors filed a lawsuit which alleged that members of the Milwaukee police force conspired to conceal the true facts of the shooting and that this conspiracy deprived the plaintiffs of their due process rights. Evidence presented at trial indicated that the cover-up was partly a product of racial discrimination amongst the police force. The jury delivered a verdict in the plaintiff's favor. On appeal, we were presented with an argument maintaining that the plaintiffs' right of access to the courts was not a federally protected right. *Id.* at 1260. Defending the jury's verdict, we held that the obstruction of legitimate efforts to vindicate a killing interfered with the due process right of access. *Id.* at 1261. Our holding was motivated in particular by the egregiousness of the police conduct in that case and the prejudice resulting from the excessive delay. *Id.* at 1264.

Try as they might, the Vasquezes cannot successfully analogize their predicament to that of the plaintiffs in *Bell.* Though the actions of the defendants in this case are inexcusable, the magnitude of the injury suffered by the Vasquezes is not nearly that sustained by Bell's family. Unlike the twenty-year delay in *Bell*, the actual circumstances surrounding the shooting here were revealed publicly within six months of the incident. And subsequent to the Task Force's investigation, the Vasquezes were granted access to the records of that investigation for use in their own legal action. Hence, the delay, albeit frustrating for the Vasquezes, has not been without some benefit for them. Armed with the information unearthed by

the Task Force, they are at a significant advantage in a state tort action against the defendants. The same could not be said in *Bell* where the prejudice to the plaintiffs was extraordinary and extreme.

The Vasquezes contend that this reasoning "suggests the analogy of someone being 'a little bit pregnant.'" Specifically, they maintain that the difference in the delay does not adequately distinguish *Bell* because an act must be either wrongful or not wrongful at the time it was done. In their words, "The passage of time does not alter the character of those acts."

We reiterate that by our holding, we do not mean to defend the defendants' actions. The deplorable nature of their conduct is without question. Nevertheless, though the Vasquezes are correct in their assertion that the wrongfulness of an act is judged at the time it is done, the constitutionality of that act may indeed depend on other contextual factors including the passage of time. "Not every act of deception in connection with a judicial proceeding gives rise [to a constitutional action]." *Id.* at 1265. The Vasquezes' constitutional rights were ultimately preserved in this case. The cornerstone of our decision in *Bell* was that the conspiracy had prevented a full and open disclosure of facts crucial to the cause of action, rendering hollow the plaintiffs' right of access. In this case, the cover-up failed to achieve such ends. There are no allegations claiming that the Vasquezes have been prevented from pursuing a tort action in state court or that the value of such an action has been reduced by the cover-up. We agree, therefore, with the district court in holding that the delay caused by the defendants' alleged conspiracy failed to deprive the Vasquezes of their right to access.

Having determined that the Vasquezes failed to sufficiently demonstrate a constitutional injury, we need not address alternative arguments which the defendants offer in defense of the decision below. The district court's holding is, therefore,

AFFIRMED.

CRABB, *District Judge*, dissenting.

> The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship, and must be allowed by each state to the citizens of all other states to the precise extent that it is allowed to its own citizens. Equality of treatment in this respect is not left to depend upon comity between the states, but is granted and protected by the Federal Constitution.

Chambers v. Baltimore & Ohio Railroad, 207 U.S. 142, 148 (1907) (citations omitted). Because, in my judgment, plaintiffs have stated a case for conspiracy by state actors that deprived them of their right of access to the courts, I would reverse the district court's grant of summary judgment.

To sustain a cause of action for conspiracy under § 1983, plaintiffs must show that a conspiracy existed and that it deprived them of rights protected by federal law. *Bell v. City of Milwaukee*, 746 F.2d 1205, 1254 (7th Cir. 1984). The district court has conceded that there is sufficient evidence of a conspiracy to defeat defendants' motion for summary judgment on this aspect of plaintiff's claim. ("Obviously, certain pieces of evidence point to a possible conspiracy" and given "the Seventh Circuit's directives in allowing circumstantial evidence to paint the conspiratorial picture, we refrain from holding that no conspiracy existed.") With the district court's assumption that there was sufficient evidence of a conspiracy, the only question is whether the Vasquezes' right of access to the courts was abridged by this conspiracy.

The Fourteenth Amendment entitles an individual to a fair opportunity to present a claim where that claim has a reasonable basis in fact or law. *Bell*, 746 F.2d at 1261 (citing *Armstrong v. Manzo*, 380 U.S. 545 (1965) and *Bill Johnson's Restaurants, Inc. v. N.L.R.B.*, 461 U.S. 731

(1983)). A conspiracy to obstruct an individual's legitimate efforts to seek judicial redress for such a claim interferes with the individual's due process right of access to the courts. *Bell*, 746 F.2d at 1261. Loralee Vasquez had a legitimate tort claim when she was shot in the ear. It follows that a police conspiracy to conceal the facts that form the basis of that claim hinders her from pursuing that claim and thus abridges her right of access to the courts with respect to that claim. The conspiracy in this case prevented Mrs. Vasquez from fully exercising her legal right to redress for at least four months. Before hints of a possible police cover up were revealed, her chose in action against members of the Cicero Police Department was rendered worthless by dint of the conspiracy. That defendants have interfered with plaintiffs' right to access to the courts is evident.

The majority raises the valid concern that the length of the delay was minimal and casts the Vasquezes' plight as insignificant compared to the decades-long cover up that prevented the *Bell* plaintiffs from bringing their suit. The majority's view is that the four-month delay has not prevented the Vasquezes from bringing suit well before the statute of limitations expired and, therefore, should be seen as a deprivation unworthy of constitutional protection. My principal difficulty with this approach is that it provides no guidance on how future courts or litigants might analyze threats to access to the courts posed by a conspiracy of state actors.

Rather than simply concluding that a situation does not compare favorably to *Bell*, or attempting to set temporal boundaries for determining whether a particular delay caused by a conspiracy of state actors passes constitutional muster, I believe that the analysis should encompass a variety of factors, including the length of the delay, the reason for the delay, and the prejudice caused by the delay. These considerations are among those employed in determining whether a defendant's right to a speedy trial has been abridged, *Doggett v. United States*, 505 U.S. 647, ____, 112 S. Ct. 2686, 2690-93 (1992); *Barker v. Wingo*,

407 U.S. 514, 530 (1972), or whether one's due process right against oppressive pre-indictment delay has been violated. *United States v. Lovasco*, 431 U.S. 783, 789 (1977) *reh'g denied* 434 U.S. 881 (1977); *United States v. Canoy*, 38 F.3d 893, 901-02 (7th Cir. 1994) (two-pronged inquiry into pre-indictment delay: prejudice and reason for delay).

The analogy between speedy trial or pre-indictment delay analysis and that of the right to access to the courts is not perfect: the concern for protecting a defendant facing incarceration is not present in a civil claim. Still, the comparison is a good one: both situations involve state action that can cause delay in having one's case heard in a timely fashion to the potential prejudice of one's rights. Indeed, in *United States v. Eight Thousand Eight Hundred & Fifty Dollars*, 461 U.S. 555, 562-64 (1983), the Supreme Court deemed the *Barker* speedy trial analysis analogous to the question whether the government's delay in filing a civil forfeiture proceeding violated an individual's due process right to a hearing in a timely fashion. In the present case, there is a close relationship among the causes and effects of the length of the delay, the reasons for the delay, and prejudice.

An examination of the length of the delay reveals that it is sufficient to show significant harm to the plaintiffs. Length of delay is something of a "triggering mechanism" in speedy trial analysis, *Barker*, 407 U.S. at 530, and germane to an access to the courts inquiry as well. Although delay itself is not tantamount to prejudice, *Cabinetree of Wisconsin, Inc. v. Kraftmaid Cabinetry, Inc.*, 50 F.3d 388, 391 (7th Cir. 1995), it may raise a presumption of prejudice. *Barker*, 407 U.S. at 530. Delay need not be extraordinarily long in order to find a constitutional violation:

> In applying the *Barker* balancing test . . . [l]ittle can be said on when a delay becomes presumptively improper, for the determination necessarily depends on the facts of the particular case. Our inquiry is the constitutional one of due process: we are not establishing a statute of limitations. Obviously, short delays—

> *of perhaps a month or so*—need less justification than longer delays.

Eight Thousand Eight Hundred & Fifty Dollars, 461 U.S. at 565 (emphasis added).

In concluding that the Vasquezes have not been deprived of the right to access to the courts the majority appears to rely on the fact that they were not totally prevented from pursuing a tort action in state court. This reasoning contradicts this court's earlier pronouncements that in order to deny access to the courts, one "need not literally bar the courthouse door or attack plaintiffs' witnesses." *Bell*, 746 F.2d at 1261. The majority acknowledges that where police officers "shield from the public and the victim's family key facts which would form the basis of . . . claims for redress," the constitutional right of access to the courts is clearly abridged. *Bell*, 746 F.2d at 1261. To require total loss of a cause of action "would encourage police officials to conceal the circumstances related to unlawful [acts] committed under the color of state law and other deprivations of federal rights which Section 1983 was designed to remedy." *Id.* For example, if it were necessary to allege a total loss of a cause of action in order to state a claim of denial of access to the courts, then, in theory, no constitutional violation would result even if the police concealed evidence of a crime until the day before the applicable statute of limitations ran. Such a proposition is unacceptable.

In *Bell*, this court cited approvingly a similar case from the Fifth Circuit, *Ryland v. Shapiro*, 708 F.2d 967 (5th Cir. 1983), in which plaintiffs alleged that their daughter had been killed by a local official and that two other officials conspired to hinder police investigation and to cover up facts about the death for nearly a year. *Bell*, 746 F.2d at 1260-61. *Ryland* does not rely on loss of a cause of action for its finding of harm to the plaintiffs. Rather, the court found constitutional harm in the *delay* in the prosecution of an action caused by the actions of state officers.

> Delay haunts the administration of justice. It postpones the rectification of wrong and the vindication of the unjustly accused. It crowds the dockets of the courts, increasing the costs for all litigants, pressuring judges to take short cuts, interfering with the prompt and deliberate disposition of those causes in which all parties are diligent and prepared for trial, and overhanging the entire process with the pall of disorganization and insolubility. But even these are not the worst of what delay does. The most erratic gear in the justice machinery is at the place of factfinding, and possibilities for error multiply rapidly as time elapses between the original facts and its judicial determination.

Ryland, 708 F.2d at 974 (quoting *Rhequark v. Shaw*, 628 F.2d 297, 303-04 (5th Cir. 1980)). Unlike the twenty-year delay following the initial crime in *Bell*, the cover-up in *Ryland* lasted approximately eleven months. *Id.* at 969. Although this delay was longer than the one at bar, the case illustrates that a finding of constitutional harm does not require a total loss of a cause of action as a consequence of the running of statutes of limitations or a decades-long delay. We cannot assume that a four-month delay in bringing a cause of action in this case would not have resulted in "stale evidence and the fading of material facts in the minds of potential witnesses." *Id.* at 975.

The second consideration, reasons for the delay, argues for finding constitutional injury in this case. In speedy trial analysis, deliberate delay by the government weighs heavily in favor of finding breach of the constitutional right. *Barker*, 407 U.S. at 531. Similarly, in pre-indictment delay cases, deliberate delay may impute a violation of due process even if the indictment is brought within the limitations period. *United States v. Gouveia*, 467 U.S. 180, 192 (1984) (citing *Lovasco*, 431 U.S. at 789-90). I see no reason to alter this analysis when examining interference with access to the courts caused by a conspiracy of state actors. The *reason* for delay in this particular case could hardly be more egregious. The very nature of a conspiracy

makes it difficult for parties from whom evidence or other information is being withheld to determine the extent of their harm. When state actors seek to protect one or more of their own by concealing evidence, hindering investigation or failing to cooperate with the judicial process, it is all the more difficult to discern the full extent of the victim's deprivation. Where, as here, there is evidence of a conspiracy to intentionally impede justice, the showing of prejudice required should be minimal.

The third consideration lies in prejudice to the plaintiffs. The district court made no specific findings on the matter of prejudice. This is unfortunate. I believe that very little prejudice would be necessary in order to state a claim of improper interference with the right of access to the courts where there are credible allegations of a deliberate cover-up by government officials. *See Hessel v. O'Hearn*, 977 F.2d 299, 303-04 (7th Cir. 1992) (doctrines such as *de minimis non curat lex* may be relevant to due process inquiry, but have little if any application to deliberate wrongs). Although the lower court implied that prejudice has been minimized by the FBI's actions, the majority has relied on the fact that, despite the conspiracy, plaintiffs were still able to bring claims against the defendants. As I stated earlier, this is an unsatisfying ground upon which to base a finding of no constitutional harm.

I find disturbing the majority's implication that the efforts of the FBI have blunted the effects of the insidious actions of the police to the point of rendering them harmless. I do agree with the majority's general sentiment that in all likelihood the harm done to the Vasquezes as a result of the conspiracy has been mitigated in part by the serendipitous investigation by the FBI. Nevertheless, the FBI's actions do not absolve the defendants of their egregious behavior or the subsequent cover-up. Although it seems certain that the FBI report on the incident put the Vasquezes in a better position than they would have been after months of an undisclosed police cover-up without such a report, it is not a forgone conclusion that the

Vasquezes are better off than they would have been if the police had acted appropriately from the very beginning. Memories fade with time. Witnesses may have responded differently to investigators hired by the Vasquezes shortly after the shooting than they did in the FBI interviews months later. It is possible also that witnesses available soon after the incident became unavailable by the time the FBI arrived on the scene.

Although the amount of harm suffered by the Vasquezes is difficult to determine at this stage, they have suffered some harm from delay alone. If the bullet that struck Mrs. Vasquez did come from the Super Bowl party and the investigation was hindered by the actions of the police, then Mrs. Vasquez's tort claim was rendered useless for months at least in part because of defendants' actions. Improperly denying her information that would have allowed for earlier legal action amounts to harm. This harm is in addition to that possibly suffered as a result of those investigatory burdens discussed earlier and the lack of information plaintiffs *still* suffer because of the defendants' continuing conspiracy of silence.

Finally, one of the fundamental purposes of § 1983 is deterrence.

> Title 42 U.S.C. § 1983 provides a cause of action against "[e]very person who, under color of any statute . . . of any State . . . subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws . . . ." The purpose of § 1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails.

Wyatt v. Cole, 504 U.S. 158, 161 (1992) (citing *Cary v. Piphus*, 435 U.S. 247, 254-257, 98 S. Ct. 1042, 1047-49 (1978)); *Graham v. Sauk Prairie Police Comm'n*, 915 F.2d 1085, 1104 (7th Cir. 1990) ("Section 1983 damages are considered to be appropriate as long as those damages gen-

erally effectuate the policies underlying § 1983."). Allowing the actions of the federal government to negate the iniquitous behavior of state actors frustrates this deterrent purpose. Even if the harm done to plaintiffs is small, as the majority suggests, the goals of § 1983 urge availability of damages.

Because I believe that the trial court has not properly weighed the interrelated factors of the length of the delay, the reasons for the delay, and resulting prejudice to the plaintiffs, I would remand this case for further findings. Because I find that the Vasquezes' right to access to the courts has been impaired and because allowing the fortuitous actions of an outside entity to absolve the wrongdoer would frustrate the deterrent purposes of § 1983, I respectfully dissent.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA AO7XXXC-92-001—Midwest Law Printing Co., Inc., Chicago—7-14-95

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois

Judgment- with Oral Argument

Date: July 14, 1995

Before: Honorable William J. Bauer, Circuit Judge
Honorable John L. Coffey, Circuit Judge
Honorable Barbara B. Crabb, District Judge*[1]

No. 94-2447

Loralee Vasquez and Charles Vasquez,
Plaintiff-Appellants

v.

Lt. Charles Hernandez, Officers Robert Kierny,
Jackie Lee Dukes, et al.,
Defendants -Appellees

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division
No. 91 C 4008, George M. Marovich, Judge

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

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* The Honorable Barbara B. Crabb, Chief Judge of the United States District Court of the Western District of Wisconsin, is sitting by designation.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LORALEE VASQUEZ and CHARLES VASQUEZ,	)
Plaintiffs,	) 91 C 4008
v.	) Judge George) Marovich
LT. CHARLES HERNANDEZ, OFFICERS ROBERT KIERNEY, JACKIE LEE DUKES, DANIEL DiMENNA, JOSEPH SIRGEDAS, GEORGE JANECEK[1], FIREMAN DANIEL ACCARDO[2] and OFFICERS WILLIAM PFIEFFER, STEVEN GRATACE, SUPERVISOR JERRY ERJAVEC, DETECTIVES ANTHONY INIQUEZ and HOWARD HATTON, LT. BRUNO JANKAUSKAS, THE TOWN OF CICERO, PRESIDENT HENRY KLOSAK AND SUPERINTENDENT EMIL SCHULLO[3],	)
Defendants.	Filed May 17, 1994

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[1]Plaintiffs voluntairly dismissed George Janecek as a party on May 20, 1993.

[2]Defendant Daniel Accardo's Motion to dismiss was granted by this Court on April 6, 1993 thus terminating Accardo as a party.

[3]All claims in the Complaint were dismissed against Defendants the Town of Cicero, Henry Klosak and Emil Schullo in this Court's Order of October 27, 1992 and the parties were ordered dismissed on November 6, 1992.

MEMORANDUM OPINION AND ORDER

Plaintiffs Loralee and Charles Vasquez ("Plaintiffs") originally brought this suit against various members of the Cicero Police Department and one member of the Fire Department ("Defendants") after Mrs. Vasquez was injured by a bullet which came through the window of her home and struck her in the ear. The defendants[4] moved to dismiss the Complaint pursuant to Fed. R. Civ. P. 12(b) (6). We dismissed Plaintiffs' § 1985 claim and denied the motion as to the 1983 claim because we construed that claim to allege a conspiracy under §1983. Now the ten remaining Defendants[5] have moved this Court for summary judgment.

I. BACKGROUND

Because a conspiracy has been alleged and because each Defendant has moved separately for summary judgment, the Court will recite the facts for each Defendant separately. The facts recited below are those which were gleaned from the 12(m) statement presented to the Court by each Defendant and therefore represent each respective Defendant's version of the events. The matrix upon which each of these individual recitations of fact is placed is the injury of Loralee Vasquez from

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[4]We originally divided the Defendants into subgroups depending upon their role in the alleged shooting and subsequent cover-up. The first group of Defendants consists of those officers who attended the party at Officer Hernandez' house and includes Officers Kierny, Dukes, DiMenna, Sirgeda, and Janecek. We refer to this group as the "Hernandez Defendants." The second group consists of those who responded to the incident at the Vasquez' home and investigated the shooting. This group we refer to as the "Pfieffer Defendants" and consists of Officers Pfieffer, Gratace, Supervisor Erjavec, Detectives Iniquez and Hatton, and Lieutenant Jankausas.

[5]Although Defendant Dukes has responded to the complaints filed in this case, he has not moved for summary judgment along with the other Defendants.

a bullet which entered her home on the night of January 27, 1991.

A. Local Rule 12

As the parties are aware, we operate in this district pursuant to our Local Rules. One of those rules is Local Rule 12 which applies to summary judgment motions. If the party opposing summary judgment fails to state any disagreement with the facts set forth in the movant's 12(m) statement, those facts are deemed admitted. These requirements have been strictly enforced in this district; see Passant v. Jackson Natal Life Ins. Co., 768 F. Supp. 661, 663 (N.D. Ill. 1991); Davis v. Frapolly, 756 F. Supp. 1065, 1069-70 (N.D. Ill. 1991), and in the Court of Appeals. See Brown v. United States, 976 F. 2d 1104, 1108 (7th Cir. 1992); Schulz v. Serfilco, Ltd., 965 F. 2d 516, 519 (7th Cir. 1992); Capitol Converting Equip., Inc. v. LEP Transp., Inc., 965 F. 2d 391, 394-95 (7th Cir. 1992); Bell, Boyd and Lloyd v. Tapy, 896 F. 2d 1101, 1103 (7th Cir. 1990).

The rigorous requirements of the rule are not arbitrary or petty, but rather were enacted in order to aid the court in ascertaining the factually supported claims from those which are defenseless. Bell, Boyd, & Lloyd v. Tapy, 896 F. 2d 1101, 1103 (7th Cir. 1990). One of the problems which arose when the Court delved into the statement of additional material facts presented by the Plaintiffs was the admissibility of certain statements. Because much of the information which eventually came to light only became evident after the FBI's investigation into the matter, Plaintiffs cite frequently to the FBI reports as support for their assertions.

Unfortunately for Plaintiffs, some of these FBI reports

contain hearsay. The Court does not dispute the admissibility of the reports when they contain mere factual information which is allowed under Fed. R. Evid. 803 (8) (b). However, when the FBI reports contain statements made by others and then related to the FBI Special Agent, hearsay complications arise. For example, Plaintiffs cite to an FBI investigative report for a statement from Cicero Police Dispatcher, Heather Ockzo, who says that she received a call from Defendant Hernandez on the night in question. Not only do Plaintiffs use the report for the dispatcher's statement that she received a call, but also, for the substance of the call she received. The report states: "Hernandez told Ockzo that if anyone called to complain about the noise to ignore it because, "We're just blowing off fireworks outside," or approximately those words." Statement supporting a party's position on summary judgment based on hearsay rather than personal knowledge are not permissible in a Rule 56 motion. Randle v. LaSalle Telecommunication, Inc., 876 F. 2d 563, 570 n.4 (7th Cir. 1989) .[6] We therefore have deleted any hearsay statements from the FBI reports but we have allowed the reports for all factual information which is contained within them.

B. FACTS

According to a memorandum dated February 11, 1992, a shooting incident occurred at the residence of Defendant Charles Hernandez on Super Bowl Sunday, January 27, 1991, in which Hernandez's neighbor, Loralee Vasquez, was struck in the ear "by a bullet fired by one of several off-duty Cicero Police officers shooting at a target of Saddam Hussein in Hernandez's

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[6]The Seventh Circuit has indicated that written FBI investigative reports should not be admitted into evidence when the first-hand testimony is available. See U.S. v. Kane, 944 F.2d 1406, 1412 n.2 (7th Cir. 1991)

backyard." Plaintiffs filed this civil action against Hernandez and others who were allegedly in attendance at a party at Hernandez's house at the time of the shooting, and against the officers involved in the investigation of the shooting of Loralee Vasquez.

1.) Defendant William Pfeiffer

In January of 1991, Pfieffer was assigned to the patrol division of the Cicero Police Department. On January 27, 1991, Pfieffer was on duty, working the afternoon shift. Pfieffer first learned of the shooting of Plaintiff Loralee Vasquez through the dispatcher when he was on patrol. The substance of the dispatch message was that a woman had been shot. Pfieffer, who was alone in his squad car, responded to the dispatch. Officer Gratace also responded to the dispatch.

When Pfieffer arrived on the scene Loralee Vasquez was in the kitchen with her husband and appeared to be wounded in the ear. Mr. Vasquez told Pfieffer that he and his wife were sitting in the family room when they heard what sounded like shots or firecrackers. When he went to look out the window and, on his way back toward the chair, he heard the window break and pulled his wife to the floor.

Pfieffer observed the room where the shooting took place and noted a bullet hole in the window and saw one slug on the floor under a table. The slug was not embedded in anything, so Pfieffer retrieved it and stored it in his hand.

After talking to Mr. Vasquez and after retrieving the spent bullet, Pfieffer called his supervisor and the detectives via radio for assistance. An ambulance had already been dispatched to the scene by the police dispatcher. It was the practice of the

Cicero Police Department to have a supervisory officer and the detectives respond to a shooting incident involving an individual. Officer Gratace was the next to arrive at the scene, followed by Sergeant Erjavec and then Detectives Hatton and Iniquez.

Pfieffer explained to Erjavec what Mr. Vasquez had told him about the shooting. He then went outside to the back of the Vasquez' home. Pfieffer inspected the window that the bullet had come through, then inspected the garage. Pfieffer found a bullet hole in the side of the garage facing the home, and then went into the alley which was dark, and found two bullet holes in the overhead garage door. Erjavec was with Pfieffer while Pfieffer was inspecting the outside of the Vaquez' home.

As Pfieffer was standing in the alley, Charles Hernandez, a Cicero Police Sergeant, came up and asked him what had happened. Pfieffer was surprised to see Hernandez because Pfieffer did not know that Hernandez lived in the neighborhood. Pfieffer told Hernandez that a woman had been shot in the ear. Hernandez then told Pfieffer that he had been having problems with some gang members and the bullet may have been meant for him.

After speaking with Hernandez, Pfieffer then had Mr. Vasquez open the garage door and he inspected the inside of the garage for a spent round. Pfieffer found a spent round lodged in the roof above the service door of the garage. Erjavec was with Pfieffer when Pfieffer found the spent round in the garage. Pfieffer stored the round in his hand, and eventually turned the round over to the detectives.

After talking to Mr. Vasquez, Pfieffer went to the homes of the neighbors on both sides of the Vasquez' home. No one

was home at one house, and the couple at the other house told Pfieffer that they had heard what sounded like firecrackers in the alley. Pfieffer did not speak to any other neighbors.

Pfieffer's opinion at this time was that the incident was the result of a drive-by shooting by gang members who were looking for Sergeant Hernandez. Pfieffer based his opinion on what Sergeant Hernandez had told him. Pfieffer never went into the Hernandez' backyard.

Lieutenant Jankauskas was the lieutenant on duty the evening of the Vasquez shooting. Pfieffer did no speak with Lieutenant Jankauskas at any time after leaving the Vasquez' home. Pfieffer spoke with Detectives Hatton and Iniquez when he returned to the police station. He told the detectives what Mr. Vasquez had told him, and also that projectiles had been recovered from the scene. Pfieffer also told the detectives what Hernandez and the neighbors had said about the shooting. Pfieffer went back on patrol after speaking with the detectives. He did nothing further to investigate the shooting of Loralee Vasquez. Sometime after his investigation of the Vasquez' shooting, Pfieffer learned that there had been a party at Hernandez's home the evening of the shooting. Pfieffer never learned who shot Loralee Vasquez.

2.) Defendant Hernandez

Charles Hernandez is employed as a police officer of the Town of Cicero. On the night of January 27 , 1991, Defendant Hernandez was off duty and held a party at his house. In his 12(m) statement of material facts, he states that "at no time did he, acting as a police officer of the Town of Cicero, knowingly perform any act with relation to [the Vasquez] investigation." Hernandez denies any involvement in any agreement between any

of the Defendants.

3.) Defendant Sirgedas

In January of 1991, Sirgedas was employed by the Town of Cicero in the Police Department. He was not on duty on January 27, 1991. Instead, he attended a Super Bowl party at Charles Hernandez' house. He was not in uniform and does not recall carrying a gun. He drank beer and hard alcohol at the party. He does not recall hearing or seeing anyone discharge a firearm at the party. He next learned of the shooting of Loralee Vasquez when he was contacted by the FBI in the spring of 1991.

4.) Defendants Dimenna and Kierney

Although the evidence presented to the Court shows that Dimenna and Kierney were present at the Hernandez' home for the Super bowl party on the night of January 27, 1991, both Defendants do not present any facts in their 12(m) statements regarding that night. Instead, like Hernandez, they simply assert that none of the evidence presented by Plaintiffs demonstrates any conspiracy and they further deny any involvement or knowledge of a cover-up.

5.) Defendants Iniquez and Hatton

Hatton and Iniquez are both police officers for the Town of Cicero. They are partners assigned to the detective division of the Cicero Police Department since 1987. On January 27, 1991, they were working the afternoon shift, from four o'clock p.m. to midnight.

Officer Pfieffer called Detectives Hatton and Iniquez at

the Cicero Police Department from the Vasquez' home and then later after returning to the Cicero Police station. At that time, Officer Pfieffer gave the detectives the two spent bullets and a copy of the General Report Form and informed the detectives of what had happened. Officer Pfieffer told Hatton that the victim had been shot while in her dining room and that he had found one bullet in Plaintiffs' home, and one bullet in Plaintiffs' garage.

After receiving the two spent bullets, Hatton and Iniquez put them in an envelope and put the envelope on their clipboard. Neither Hatton nor Iniquez filled out an evidence receipt or an evidence envelope at that time. After Officer Pfieffer told them that the shooting victim was at the hospital, they left the Cicero police station and drove directly to MacNeal Hospital to speak with Plaintiffs about the shooting. The victim told the detectives that she had no idea who might have shot her or why she was shot.

At one point at the hospital, the victim asked whether the detectives knew why the shooting occurred, and one of them told her that the man who li ves across the alley from them is a police officer and so it was possible that the shots were meant for his home and not Plaintiffs. Detective Iniquez told Plaintiffs that "gangbangers" may have done the shooting.

After leaving the hospital, Detectives Hatton and Iniquez drove to Plaintiffs' home. No police officers were present when they arrived. Because they knew that the uniformed officers had already done so, the detectives did not speak to any neighbors. Iniquez observed the window in the back of the Vasquez' home and saw a small hole in it. Hatton and Iniquez observed a bullet hole on the alley side and one bullet hole on the yard side of Plaintiffs' garage, as well as a bullet hole in the window frame of Plaintiffs' home. Hatton did not search the alley between

Plaintiffs' home and the home of Charles Hernandez.

After looking at Plaintiffs' home and garage, Hatton and Iniquez walked across the alley to Hernandez' home to see if anyone had heard anything. Hatton knew that the home was Hernandez' home because Iniquez told him. There was a garage at the back of the Hernandez' home with a tarp on the outside of it. Hatton glanced at the tarp before he went into the Hernandez' home, but did not look at the tarp for bullet holes. Hatton did not see a picture of Saddam Hussein in Hernandez' backyard. Hatton did not see any bullet hole in the Hernandez'garage.. Hatton and Iniquez went to the back door of the Hernandez home. Hatton saw Hernandez when he entered Hernandez's house. Hatton could smell alcohol on Hernandez, but did not notice anything unusual about Hernandez's speech or his gait. Iniquez noticed that Hernandez appeared intoxicated.

Hatton did not speak to Hernandez that evening, but was present when Iniquez spoke with him. When Iniquez asked Hernandez if he had seen or heard anything relating to the shooting, Hernandez told Iniquez that he heard fireworks or firecrackers out in the alley. After Hatton and Iniquez left the Hernandez' home, they returned to the police station. At the Cicero police station, Detectives Hatton and Iniquez filled out the Supplemental Report Form or "victim statement," the evidence receipt, the evidence envelope, and the Tour of duty form. Because they had suspicions that the shot that hit the victim may have come from Hernandez's yard, and they did not want the evidence to disappear, Hatton and Iniquez placed the spent projectiles into the evidence envelope and placed the evidence envelope and the evidence receipt into Iniquez's top desk drawer, which they then locked. They felt the matter was going to be investigated by Internal Affairs and they wanted to make sure that the evidence was preserved and nothing happened

to it and it was there for further investigation.

Hatton spoke with his supervisor, Lieutenant Baldwin, about the Vasquez' investigation the day after the shooting. Lieutenant Baldwin had read the reports that discussed the shooting of Plaintiff before he met with Hatton. Specifically, Lieutenant Baldwin read the General report Form and the Tour of Duty form. Both the General Report Form and the tour of Duty form referred to two spent bullets. In addition, the General Report Form indicates that Officer Pfieffer turned the bullets over to Hatton and Iniquez. Baldwin never asked Hatton about the bullets that were listed on those forms. After that discussion with Baldwin the day after the shooting, Hatton had no further conversation with Baldwin about the shooting. Neither Hatton nor Iniquez was ever ordered to perform any follow-up investigation on the Vasquez shooting, and the file on the Vasquez shooting remained "open." About four months later, in May of 1991, the FBI came to the Cicero Police Department and recovered the spent bullets from Detective Iniquez's desk. Until the FBI arrived in May, 1991, Hatton had no conversation with anyone other than Detective Iniquez and Lieutenant Baldwin about the shooting.

6.) Defendant Jankauskas

Defendant Jankauskas's position with the police department was Shift Lieutenant, Patrol Division. On January 27, 1991, Jankauskas was assigned to desk duty during the 4:00 p.m. to midnight shift. The desk duty assignment in the Cicero Police Department involved taking care of the front window, answering phones, and taking incoming calls. Jankauskas' duties did not include the investigation of crime. As Shift Lieutenant on January 27, 1991, Jankauskas was supervisor of the sergeants and the patrolmen, but not the detectives. Jankauskas handled

business inside the Cicero police station, and the sergeant on duty handled business outside the police station. Jankauskas first had knowledge of the Vasquez shooting incident when he overheard the radio dispatcher send a car because of a report of possible shots fired. Jankauskas himself never went to the scene of the Vasquez shooting.

Officers Pfieffer and Gratace and Sergeant Erjavec did not report back to Jankauskas after they made their investigation of the Vasquez shooting. Officers Pfieffer and Gratace and Sergeant Erjavec did not show Jankauskas any evidence that they retrieved from the scene of the Vasquez shooting. Jankauskas signed on report concerning the Vasquez shooting incident, namely, the General Report Form prepared by Officer Pfieffer. As Shift Lieutenant, Jankauskas signed all General Report Forms completed on his shift. Jankauskas' signature on Officer Pfieffer's report verifies that Officer Pfieffer completed the report properly and that Pfieffer had signed the report.

Jankauskas first learned of the party at Hernandez's home more than a week after the Vasquez incident. Jankauskas never learned what events occurred during the party at Officer Hernandez's house and never knew who attended Hernandez's party. Jankauskas alleges that Detectives Iniquez and Hatton and Officer Pfeiffer never discussed the Vasquez shooting incident with him. Jankauskas learned from the radio that the report of shots fired involved the shooting of Mrs. Vasquez. Jankauskas did not do anything when he heard that Mrs. Vasquez had been shot because the sergeant on the scene had called for the detectives and the ambulance.

7.) Defendant Gratace

On January 27, 1991, Gratace was working the 4:00 p.m.

to midnight shift when he responded to the call at the Vasquez home. Officer Pfieffer helped Gratace search the inside of the home for the bullet shells. After searching inside the Vasquez home, Gratace went out the back door into the alley with Officers Pfieffer and Dorko, and Sergeant Erjavec. Over ten people, neighbors of the Vasquezes, were in the alley. Gratace spoke with neighbors who were in the alley. Gratace did not take any notes of his conversations with the neighbors and did not make out a report on his conversations. Gratace spoke with the neighbors for only a few minutes because they all told him the same thing - that they heard what sounded like fireworks going off. None of the neighbors had seen a car in the alley at the time that they heard the noise.

After speaking with the neighbors, Gratace searched the entire alley for shell casings and checked for bullet holes in the overhead doors and framings of the garages on the alley. Gratace looked at the Hernandez garage, as well as the garages of the other neighbors. Hernandez's garage had a tarp over the front of it but Gratace did not see any bullet holes in the tarp. Gratace found a shell casing outside the Vasquez garage when he was searching the alley. When he found the casing, Gratace gave it to either Detective Hatton or Detective Iniquez. Gratace never saw the shell casing again after he gave it to the detectives. Gratace noticed two bullet holes in the overhead door to the Vasquez garage.

Officers Dorko and Pfieffer, as well as Sergeant Erjavec, were with Gratace when he noticed the bullet holes in the Vasquez garage. Gratace, along with Officers Dorko and Pfieffer and Sergeant Erjavec, then searched the inside of the Vasquez garage. One of the officers found a spent shell inside the Vasquez garage, above the rear door. Officer Dorko dug the shell out with a screwdriver. Gratace then went back to the alley

and spoke with Dorko, Pfieffer, Erjavec and Charles Hernandez. At that time, Hernandez asked Gratace what was going on. Gratace told Hernandez that a neighbor across the alley had been shot. Hernandez appeared surprised and said that he had heard a noise that sounded like fireworks. During the conversation with Hernandez, Gratace, Dorko, Pfieffer and Erjavec speculated that the shot may have been the result of a drive-by shooting. Hernandez then said that he was having problems with a family on a case that he was working on, and said that he may have been the intended target of the shooting and that Mrs. Vasquez may have been struck by mistake.

At this time, Gratace did not have an opinion as to who had fired the shots. At the time of the conversation with Hernandez, Gratace did not know that Hernandez was having a party. Gratace then spoke briefly with Officer Dorko about the shooting and what a shame it was that Mrs. Vasquez had been hit. Gratace and Officer Dorko did not speculate about who could have done the shooting. Following his conversation with Officer Dorko, Gratace went back on patrol. The next time that Gratace heard or received any information concerning the Vasquez shooting was when the FBI came to his home the following spring.

8.) Defendant Erjavec

On January 27, 1991, Erjavec was employed by the Cicero Police Department as Patrol Sergeant or Street Supervisor. On that day, Erjavec was working the 2:00 p.m. to 10:00 p.m. shift. Erjavec's duties as Street Supervisor included supervising all uniformed officers on patrol duty but not the detectives. Erjavec heard about the incident when a telephone call came in to the dispatcher. Upon hearing about the shooting, Erjavec went to the scene in his squad car. Erjavec was alone

when he went to the scene.

When Erjavec arrived at the scene, he entered the garage where Officers Pfieffer and Gratace were. Officers Pfieffer and Gratace were on the scene because the shooting incident had been dispatched by radio. Erjavec did not direct any investigation into the shooting. The Cicero Police Department detectives had been dispatched to interrogate any witnesses, to talk with the Vasquezes and to follow up on any leads. Erjavec's role was to secure the scene of the shooting, which he did.

Erjavec then spoke with the officers on the scene who told him that they had checked with the neighbors and that the neighbors had not seen or heard anything. Erjavec and the officers speculated that the shooting may have been a drive-by shooting and that Loralee Vasquez was not the intended target of the shooting, but Erjavec never told the Plaintiffs his suspicion. Erjavec took no further action at the scene of the shooting and did not interview the Vasquezes. Erjavec wrote a Shift Commander's Daily Report for January 27, 1991. The Shift Commander's Daily Report notes that the incident was turned over to the detectives for further investigation because the detectives had been sent to the scene to talk to the Vasquezes and to follow up on any leads.

The normal procedure in the Cicero Police Department when a call comes in of shots fired is to dispatch a detective car to the scene, as well as any police cars in the vicinity. The dispatcher, who is a civilian, determines what cars to dispatch. On January 27, 1991, Erjavec did not know that Charles Hernandez lived in the vicinity of the Vasquez home. Erjavec also was not aware of a social gathering at Charles Hernandez's house. Erjavec did not review Officer Pfieffer's General Report Form. Erjavec went back to the Cicero Police Station after he

secured the scene at the Vasquez home and had no further involvement with the investigation.

Months later, Erjavec heard a rumor that there had been a party at Charles Hernandez's house, but he could not recall who told him the rumor. Erjavec was never told what happened at the party. None of the officers who attended Charles Hernandez's party told Erjavec that they had been at the party. No one ever told Erjavec who shot Loralee Vasquez.

9.) The FBI Investigation and Reports

The FBI, the Illinois State Police, and the Cook County State's Attorney's office formed a Task Force to investigate the shooting incident itself and the investigation by the Cicero Police Department. The Task Force investigation produced voluminous documents, including statements of numerous witnesses. It also involved the recovery of physical evidence, including the tarp that hung over Charles Hernandez's garage door, the spend bullets, and the weapons belonging to persons who attended the Hernandez party.

In addition to the physical evidence recovered, the Task Force generated its own evidence. The Task Force conducted examinations of the spent bullets and the weapons subpoenaed from persons who attended the Hernandez party by the Cook County Sate's Attorney's Office. The Task Force took photographs and measurements in and around the Plaintiff's home and set up a laser trajectory system to determine from where the bullets originated. They made a tracing of holes in the tarp. They also drafted a flow chart depicting that Task Force's view of the sequence of events. The forensics scientist who actually conducted the examinations of the spent bullets testified in his affidavit that the condition of the bullets did not affect in

any way the result of those examinations.

The Task Force conducted extensive interviews with Cicero Police officers and others beginning on May 9, 1991, less than four months after the shooting incident. From these numerous interviews, the following facts were also revealed.

Heather Oczko, Cicero Police Department dispatcher, received a call from Charles Hernandez on the night of the party regarding the noise in his neighborhood. Illinois Bell Telephone records indicate that a phone call was made from the Hernandez' residence to the Cicero Police Department at 6:45 p.m. on January 27, 1991.

Kristen Marino, Charles Hernandez' neighbor immediately to the north, saw Hernandez and another man in his backyard on January 27, 1991 and saw a shooting target with a portrait of Saddam Hussein over the door of a child's playhouse which was attached to the garage. She heard shots which frightened her puppy. The playhouse was taken down two to three weeks after the shooting.

Barbara Hammer, who lived two doors immediately north of the Hernandez' house, saw three or four men in the Hernandez' backyard, two of whom were in a combat shooting stance with arms pointed toward the garage area. Officer Jackie Lee Dukes saw Defendant Sirgedas go outside of the Hernandez' home with Defendants Hernandez and DiMenna and carrying a picture of Saddam Hussein. He was talking to Kierney and Palmermo when Hernandez went upstairs with the picture of Hussein. Officer Jackie Lee Dukes ("Dukes") heard Charles Hernandez call the Cicero Police station.

Officer Dukes saw Defendant Joseph Sirgedas with his

gun, a .9 millimeter, at Defendant Hernandez' home at the time in question. Officer Dukes saw Defendant DiMenna with his gun, a .9 millimeter at Defendant Hernandez' home at the time in question. Defendant Sirgedas and Kierney owned a .9 millimeter gun and ballistics reported that the bullet and jacket could have been fired from either gun.

Ulyssess Banuelos ("Banuelos") attended the party at Defendant Hernandez' home on January 27, 1991. Banuelos stated that he heard discussion about Saddam Hussein bulls-eye poster at the party. Banuelos heard several gunshots during half time of the Super Bowl game. Banuelos saw Defendants Hernandez and Sirgedas come inside from the back door during the party. Banuelos saw Sirgedas change from his dark sweatshirt to a white sweatshirt.

Under Cicero Police Department procedures, the bullets should have been submitted to the front desk to be turned over to the property clerk in the morning. The bullets stayed in the drawer until May when the FBI took them. As a result, Iniquez was charged with Official Misconduct, violating General Order 34 Section 49, in hinderance of the Police Department investigation for withholding evidence in the shooting incident. He received 5 days suspension.

General Order 34 (10) of the Town of Cicero Department of Police states that officers shall not intentionally fire their guns, except as authorized by law or at a firearm's range. It further provides that the carrying or possession of a firearm in any place, other than one's home, when alcoholic beverages are consumed by the one carrying the firearm is strictly prohibited. It further states failure to report to a fellow department member of employee's violation of a law, rule or regulation, policy or procedure, general or specific order. To this end, all such

violations shall be reported in writing to a superior in the Department.

Defendants Hernandez, Siregdas, and DiMenna were charges with violating the Cicero Code of Ordinances and General Orders, to which they pleaded nolo contendere and each was suspended for thirty days from the Cicero Police Department.

10.) Summary Judgment Standard

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56 (c); Celotex Corp. v. Catrett, 477 U.S. 317,322 (1986). In considering such a motion, the court must view all inferences in the light most favorable to the nonmoving party. See Regner v. Chicago, 789 F. 2d 534, 536 (7th Cir. 1986).

III. DISCUSSION

The various Defendants have moved for summary judgment under three major theories. First, Defendants allege that no direct evidence of a conspiracy exists and therefore Defendants are entitled to judgment as a matter of law. Second, Defendants allege that they were not acting under color of sate law and therefore no Constitutional violation occurred. Finally, Defendants assert that even if a conspiracy has been alleged there has been no injury to warrant Constitutional relief because Plaintiffs eventually received any information necessary to bring forth their claims.

A. § 1983 Conspiracy

As the Court noted in its earlier opinion, specific facts regarding conspiracies can be difficult to discover and the "very nature of a conspiracy obscures most, if not all, information about the alleged conspirators' agreement." Quinones v. Szorc, 771 F. 2d 289, 291 (7th Cir. 1985). Our review of this matter is in keeping with the Seventh Circuit's directives in Bell v. City of Milwaukee, 746 F. 2d 1205, 1261 (7th Cir. 1984) in which that court expressly held that a police conspiracy which attempts to cover-up wrongdoing by fellow police officers constitutes a Constitutional Deprivation. The deprivation is the denial of access to the courthouse door. Id. At 1261.

The court defined a conspiracy and the requisite amount of evidence necessary to establish a conspiracy as follows:

> A civil conspiracy is a "combination of two or more persons acting in concert to commit an unlawful act, or to commit a lawful act by unlawful means, the principle element of which is an agreement between the parties 'to inflict a wrong or injury upon another,' and 'an overt act that results in damage.'"

Hampton v. Hanrahan, 600 F. 2d 600 (7th Cir. 1979), rev'd in part on other grounds, 446 U.S. 754 (1981) (cites omitted). Because there will rarely be direct evidence of an express agreement among all conspirators, circumstantial evidence may used to prove the conspiracy. Hoffman-La Roche, Inc. v. Greenberg, 447 F. 2d 872, 875 (7th Cir. 1971). In order to demonstrate an agreement between the co-conspirators, "a single plan" must exist, "the essential nature and general scope of which [was] known to each person who is to be held responsible for its

consequences." Id.

Plaintiffs assert that the facts as they are presented demonstrate that Defendants knew who shot Mrs. Vasquez and they then planned to cover-up the shooting. We need to determine if sufficient circumstantial evidence exists for a reasonable jury to conclude that the Defendants shared "the same general conspiratorial objective." Bell, 746 F. 2d at 1257. Plaintiffs cite to the Bell decision as support for their assertion that enough circumstantial evidence exists to find that the defendants conspired to cover-up the Vasquez shooting.

In the Bell case, however, City of Milwaukee police officers conspired to cover-up the shooting of an African-American who was seen running from a car. After the shooting, the officers placed a knife in the victim's hand and claimed that they had been attacked. In order to protect themselves after the shooting, the officers conspired together to make their police reports uniform so that there would not be conflicting versions of the shooting. It was only after one of the officer revealed that he had lied to cover-up the truth, some twenty years after the incident, that the conspiracy was revealed.

The Bell court assessed numerous pieces of information which fit together to prove the conspiracy. There were numerous discrepancies in the testimony of the various officers. There were discrepancies in the autopsy and the police reports. Most significantly, however, was the confession of one of the police officers and the conviction of the other on the grounds of homicide by reckless conduct and perjury in connection with the Bell inquest.

In contrast, we have before us the pieces of information upon which Plaintiffs believe a finding of conspiracy lies. Unlike

the Bell case, we have no direct evidence of a conspiracy. In fact, each of the officers recites his respective version of the events by repeatedly asserting that his response to the Vasquez shooting was common police practice. Obviously, certain pieces of evidence point to a possible conspiracy.

First, Hatton and Iniquez' placement of the spent bullets in a desk drawer as opposed to an evidence envelope suggest a possible cover-up. Second, the mere denial by Hernandez, Sirgedas, Kierney and DiMenna of any shooting at a Hussein poster is questionable in light of the neighbor's testimony that such a poster was seen and that officers were also observed in the combat position in the Hernandez yard. Finally, the fact that certain neighbors who had observations of the incident were not interviewed until the FBI intervened also suggests that the incident was not fully disclosed.

This evidence certainly does not rise to the level of obstruction that was seen in the Bell case. The record is void of any evidence of a meeting of the minds or an understanding between the co-conspirators that would suggest that the officers were each wilful participants in a scheme to ver-up the shooting. See Dennis v. Sparks, 449 U.S. 24, 27 (1980). In fact, many of the inadequacies in investigating the shooting may have stemmed from a less careful and stringent investigation than from any wrongdoing. After reviewing thousands of pages of testimony, the Court has not found one piece of evidence which links these officers together with an actual agreement to conceal the truth.

We are wary, however, to hold that no such conspiracy existed. Mindful of the Seventh Circuit's directives in allowing circumstantial evidence to paint the conspiratorial picture, we refrain from holding that no conspiracy existed. It would appear that this question should be presented at trial. However, there is

a more inherent problem in the facts as they are revealed which prevents this case from going forward. That problem presents itself in the form of the injury which has resulted from any alleged conspiracy.

For the purposes of this discussion, the Court assumes that enough evidence has been presented to establish a conspiracy.[7] Even assuming that the conspiracy exists, however, the Plaintiff's claim must fail because the injury which has resulted from any alleged conspiracy has not been sufficient enough to qualify as a Constitutional deprivation under § 1983.

B. Right of Access

The constitutional right of access to the courts is found in both the First Amendment and the Due Process Clause. See Wilson v. Thompson, 593 F. 2d 1375 (5th Cir. 1979) (First Amendment assures right to petition for redress of grievances); Harris v. Pate, 440 F. 2d 315, 317 (7th Cir. 1971) 418 U.S. 539 (1974) (Right of access founded in the Due Process Clause). The Supreme Court has stated:

> The right of access to the courts, upon which Avery [Johnson v. Avery, 393 U.S. 483 (1969)] was premised, is founded in the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights. It is futile to contend that the Civil Rights Act of 1871

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[7] As the Court has stated already, we do not find that enough evidence has been presented to prove this conspiracy. It would normally be a question for the jury.

> has less importance in our constitutional scheme than does the Great Writ.

Wolff at 576.

Frequently, right of access cases arise in the context of prisoner grievances. The Fourteenth Amendment imposes a duty on state actors to refrain from preventing individuals from seeking redress in the civil courts. Wolff at 579. In situations where the state has custody of a prisoner, certain obligations are imposed upon the state to assure that the prisoner receives due process which includes a meaningful access to the courts. Bounds v. Smith, 430 U.S. 817 (1977). These cases refer to access to a law library, Bounds at 821, fees for indigent prisoners, Griffin v. Illinois, 351 U.S. 12 (1956), and availability of paraprofessionals to aid inmates in the filing of documents. Procunier v. Martinez, 416 U.S. 396 (1974).

The right of access has also been recognized in the § 1983 setting when a plaintiff is unable to gain access to the courts due to the interference of the state and its agencies. See Ryland v. Shapiro, 708 F. 2d 967 (5th Cir. 1983) (plaintiffs unable to commence wrongful death action due to wrongful interference on the part of prosecutor and coroner); Bell v. City of Milwaukee, 746 F. 2d 1205 (7th Cir. 1983) (parents of decedent unable to bring suits against municipality due to conspiracy and cover-up of incident). A conspiracy which covers up a killing and therefore thwarts the efforts for those who seek judicial redress interferes with the due process right of access to courts and its actionable under § 1983. Ryland, 708 F. 2d at 971. Bell, 746 F. 2d at 1261.

The Seventh Circuit stated in Bell:

> To deny such access defendants need not literally bar the courthouse door or attack plaintiff's witnesses. The constitutional right is lost where, as here, police officials shield from the public the basis of the family's claims for redress. A contrary interpretation of the right to due process would encourage police officials to conceal the circumstances relating to unlawful killings committed under the color of state law and other deprivations of federal rights which section 1983 was designed to remedy.

Id. The constitutional duty which is imposed upon municipal employees in situations as these is the requirement that "municipal employees involved in the investigation of a wrong perpetrated by a co-employee under color of state law not conceal the perpetration of that wrong." Id. At 1262.

This constitutional right of access, however, is not unlimited. The Supreme Court has stated that the access must be "adequate, effective, and meaningful." Bounds at 1495. One district court after viewing the evidence an al alleged conspiracy has held that "[t]e right of access is not so broad as to include a "right to know" the facts supporting a possible cause of action." Singer v. Wadman, 595 F. Supp. 188, 302 (D. Utah 1982) (cite omitted). That court held that "the conduct would have to be both deliberate and so egregious as to make plaintiff's access to the courts virtually meaningless." Id.

Of course, Plaintiffs direct us to the Bell case repeatedly in order to invoke that case's prescriptives which would allow their claims to go forward. We find the Bell case so factually

dissimilar, however, that it must be distinguished. The Seventh Circuit's directives in Bell involved a shooting which was concealed for over twenty years from the family members of the decedent. Repeated efforts were made on the part of the Bell family to bring forth their claims in numerous forums. They were not able to finally receive redress for their grievances, however, until the officer involved in the shooting came forward with the testimony which began to unravel the conspiracy. That testimony along with the numerous discrepancies in evidence and witness testimony revealed a far-reaching and effective conspiracy which totally blocked the Bell family's access to all causes of action in all forums.

In contrast, the shooting at the Vasquez home took place on January 21, 1991. Four months later, the FBI intervened and began investigating the shooting. The FBI investigation revealed testimony from neighbors who had not been interviewed before, some projectile studies and the spent casings, telephone records and various other pieces of witness testimony which were compiled in numerous FBI investigative reports. By the end of May of 1991, the Plaintiffs had within their control the fruits of a massive investigation into the incident. All records from the investigation were turned over to the Plaintiffs and, in fact, were used by the Plaintiffs in bringing this suit.

The question then becomes: What is the Constitutional injury here? Plaintiffs claim that the alleged conspiracy blocked their access to the courthouse door. Yet, Plaintiffs have come to the courthouse door equipped with more information and evidence than they would have had if they had brought this suit without the efforts of the FBI. The studies conducted by the FBI have revealed not only the direction from which the shorts were fired, but also the type of gun which fired the shots and the linkage between certain officer's weapons and the bullets.

The FBI interviews revealed at least four new versions of the events which took place on the night of January 27, 1991. Those versions include various neighbors who were not interviewed by the police and some non-party witnesses who attended the party and told of their personal observations from the perspective of some inside the Hernandez home during the time in question. In fact, it is rare that a plaintiff have before him the magnitude of arrows in his quiver that the FBI has supplied theses Plaintiffs in this case. Is it possible that a fourth month delay in obtaining this evidence has resulted in a deprivation of due process to the Plaintiffs in that they were unable to bring their case to this forum only five months after the incident took place? We think not.

Is this to say that we find that there is no wrongful activity on the part of the Defendants? Certainly not. In fact, the results of the investigation have revealed new pieces of evidence which link specific officers with the shooting either by their weapons or through the testimony of witnesses. Plaintiffs now have this information to bring forth their claims against those specific individuals. The evidence presented certainly suggests wrongful activity that resulted in an injury. That, however, is not sufficient to make it unconstitutional activity under § 1983. As the Supreme Court has stated, "[S]ection 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties arising out of tort law. Remedy for the latter type of injury must be sought in state court under traditional tort law principles." Estelle v. Gamble, 429 U.S. 97, 106 (1976).

Plaintiffs are presented with many choices when they bring their claims to court. One of those choices in a case such as this, is the forum in which their claims will be asserted, either state or federal. Here, Plaintiffs pursued their claims in the federal forum and chose to pursue a conspiracy cause of action.

Conspiracy claims under §1983 are unique creatures, however, and as we have just stated, one of the unique qualities that corresponds with a § 1983 conspiracy claim is that the injury must be one which violates our notions of Constitutional due process rights. Griffin v. Breckenridge, 403 U.S. 88, 103 (1971) (§ 1983 conspiracy claim requires an actual deprivation of rights); Hampton v. Hanrahan, 600 F. 2d 600 (7th Cir. 19 79), rev'd on other grounds, 446 U.S. 754 (1980). If that deprivation does not rise to the level of a constitutional deprivation, then the claim must fail.

We find that the Plaintiff's inability to bring their claims for four months did not deprive them of their right to access to the courts because they are still able to bring forth their claims. See Huddson v. Robinson, 678 F. 2d 462, 466 (3rd Cir. 1982) (no injury to access to courts where prisoner filed suit "later than he would have liked but prior to the date it was due").

This brings us finally to the question of whether this Court should exercise its discretion over the state law claims after we have dismissed all federal claims before us. Because we have dismissed all federal claims from this suit, and because federal courts are courts of limited jurisdiction, we decline to exercise our discretion over the pendant state claims. See Ross v. United States, 910 F. 2d 1422 (7th Cir. 1990). We do not see that this should create any undue hardship on the Plaintiffs because pursuant to the Illinois Code, Plaintiffs have one year from this order to file any state cause of action which may remain in this suit. 735 ILCS 5/13-217 (1993). We also note, that as a result of the internal FBI investigation, the Plaintiffs may bring their claims against those officers who in fact have been implicated in the shooting due to the result of the ballistics tests and interviews conducted.

CONCLUSION

For the foregoing reasons, we grant summary judgment in favor of the Defendants because Plaintiffs have failed to allege a constitutional injury sufficient for their §1983 claim to survive. We decline to exercise supplemental jurisdiction over the remaining state law claims.

ENTER:

/s/ GEORGE M. MAROVICH
UNITED STATES DISTRICT JUDGE

DATED: MAY 17, 1994

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LORALEE VASQUEZ and CHARLES VASQUEZ,	)
Plaintiffs,	) 91 C 4008
v.	) Judge George) Marovich
LT. CHARLES HERNANDEZ, OFFICERS ROBERT KIERNEY, JACKIE LEE DUKES, DANIEL DiMENNA, JOSEPH SIRGEDAS, GEORGE JANECEK, FIREMAN DANIEL ACCARDO and OFFICERS WILLIAM PFIEFFER, STEVEN GRATACE, SUPERVISOR JERRY ERJAVEC, DETECTIVES ANTHONY INIQUEZ and HOWARD HATTON, LT. BRUNO JANKAUSKAS, THE TOWN OF CICERO, PRESIDENT HENRY KLOSAK AND SUPERINTENDENT EMIL SCHULLO ,	)
Defendants.	Filed June 1, 1994

ORDER

Plaintiffs filed this Motion for Relief from Judgment and Memorandum in the matter of Vasquez v. Hernandez which has been before this Court for three years. This Court issued an opinion and order on May 17, 1994 which granted all of the Defendants' motions for summary judgement. First, Plaintiffs

claim that the Court misconstrued the time at which they received the FBI investigation reports and studies. The Plaintiffs clarify that the FBI Investigation reports were the result of numerous discovery disputes disputes throughout the months preceding the filing of the summary judgment motions, and that at the time of filing the suit, these reports were not available. Plaintiffs are concerned that this misconception may alter the Court's ruling.

In response, let us review what the Plaintiffs did have at the time of filing suit. The Plaintiffs were aware that there was an FBI investigation underway. They further were aware that Lt. Hernandez was being investigated for wrongful conduct and that the day the suit was filed, Lt. Hernandez was indicted for obstruction of justice. The detailed testimony and reports that were eventually within the Plaintiffs' control came into their control during discovery. The bottom line is this: Plaintiffs' were aware of the investigation and the possible wrongdoing on the part of at least one officer at the time of the filing of the suit. By the time the Plaintiffs responded to the motions for summary judgment, ALL of the material was within their control.

Plaintiffs claim that the Court's ruling is not supported by the applicable case law in that ANY delay should constitute an injury under § 1983 conspiracy claim. The Court stands by its earlier ruling in saying that this is simply not the case. An injury must rise to the level of a constitutional injury under § 1983 and the injury in this case simply does not rise to that level. Plaintiffs were equipped with the basic knowledge that most injured plaintiffs have prior to the discovery phase of the lawsuit. Simply because the reports and studies were revealed to them during the discovery phase and not prior to the filing of their suit, in no way alters the Court's holding. The detailed material was fully revealed to the Plaintiffs prior to the time that this mat-

ter became fully briefed in the summary judgment stage.

Second, Plaintiffs claim that the Court's holding stands for the proposition that a conspiracy must be successful in completely blocking their access to the courthouse door by destroying the state cause of action due to a statute of limitations in order to constitute a constitutional violation. This is simply not true. The Court recognized the various degrees of deprivation and cited to authority which supports a finding of constitutional deprivation in situations other then the complete loss of a state cause of action. The Court simply held that the facts of this case do not rise to the level of a serious constitutional injury under § 1983

Nothing presented to the Court in this motion alerts the Court's ruling on this matter. If the parties seek to have this issue reviewed again, they will need to take it elsewhere.

/s/ George M. Marovich
Judge

APPENDIX D
UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604
September 12, 1995

Before

Honorable William J. Bauer, Circuit Judge
Honorable John L. Coffey, Circuit Judge
Honorable Barbara B. Crabb, District Judge*[1]

Loralee Vasquez and Charles Vasquez, Plaintiff-Appellants		)United States)District Court)for the Northen
No. 94-2447	v.	)District of)Illinois,)Eastern Division
Lt. Charles Hernandez, et al., Defendants -Appellees		) 91 C 4008)George M.)Marovich, Judge

ORDER

On consideration of the petition for rehearing with suggestion for rehearing en banc filed on the above-captioned case by the plaintiffs-appellants, a majority of the judges on the original panel voted to deny and none of the judges in the active service has requested a vote thereon.

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* The Honorable Barbara B. Crabb, Chief Judge of the United States District Court of the Western District of Wisconsin, is sitting by designation.

Supreme Court, U.S.
FILED
MAR 25 1996
CLERK

No. 95-1346

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

Loralee and Charles Vasquez,
Petitioners,

v.

Lt. Charles Hernandez, Officers Robert Kierny, Jackie Lee Dukes, Daniel Dimenna, Joseph A. Sirigedas, Officer William Pfieffer, Stephen Gratace, Supervisor Jerry Erjavec, Anthony Iniquez, Howard Hatton and Lt. Bruno Jankausas,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PFIEFFER RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondents William Pfieffer, Stephen Gratace, Jerry Erjavec, Anthony Iniquez, Howard Hatton and Bruno Jankausas (hereinafter collectively referred to as "the Pfieffer Respondents") object to the Petitioners' "Question Presented." The Pfieffer Respondents submit the following Question:

Whether an individual suffers a constitutional deprivation protectable under 42 U.S.C. Section 1983 where (1) there is no evidence that state actors conspired to deprive the individual of her right of access, and (2) the individual suffered no prejudice in her ability to prosecute her state law tort claim?

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PFIEFFER RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents William Pfieffer, Stephen Gratace, Jerry Erjavec, Anthony Iniquez, Howard Hatton and Bruno Jankausas (hereinafter collectively referred to as "the Pfieffer Respondents") respectfully request this Court to deny Loralee Vasquez and Charles Vasquez's petition for writ of certiorari ("Petition").

OPINIONS BELOW

The Pfieffer Respondents agree with Petitioners Loralee Vasquez and Charles Vasquez's (the "Vasquezes") citations of the opinions and judgments delivered in the courts below.

JURISDICTION

The Pfieffer Respondents agree with the Vasquezes' statement of the grounds on which the jurisdiction of this Court is invoked.

STATUTES AND OTHER LAWS

The Pfieffer Respondents agree with the Vasquezes' statement of the statutes and other laws involved.

STATEMENT OF THE CASE

The Pfieffer Respondents object to the misstatements and omissions made by the Vasquezes in their presentation of the Statement of the Case; the Pfieffer Respondents therefore present their own Statement of the Case as follows:

On January 27, 1991,[1] Super Bowl Sunday, Petitioner Loralee Vasquez was struck in the ear by a stray bullet fired by one of several off-duty Cicero police officers who were in the back yard of respondent Charles Hernandez's home shooting at a picture of Saddam Hussein. Mrs. Vasquez and her husband, Charles Vasquez, brought this

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[1] The Vasquezes' petition incorrectly states the date of the shooting as July 21, 1991. Pet. 2.

case against two groups of defendants/respondents: (1) the officers who were involved in the shooting or were present at Hernandez's house at the time of the shooting; and (2) the officers involved in the investigation of the shooting. The second group of officers, the Pfieffer Respondents, was not present at the time Loralee Vasquez was shot. Rather, each was a Cicero police officer who was on duty at the time of the shooting. *Vasquez v. Hernandez*, No. 91 C 4008, slip op. at 5-17 (N.D. Ill. May 17, 1994), Pet. App.18-19. Pfieffer and Gratace were patrol officers who responded to the call reporting that Loralee Vasquez had been shot. *Id.*, at 5, Pet. App. 21. Erjavec, the on-duty Street Supervisor, also responded to the call reporting the shooting. *Id.*, at 16, Pet. App. 30. Hatton and Iniquez were the detectives sent to investigate the shooting. *Id.*, at 9, Pet App. 24-25. Jankauskas was the Shift Lieutenant on duty at the Cicero police station at the time of the shooting. *Id.*, 12, Pet. App. 27.

After examining the Vasquezes' home and garage, Pfieffer, the first officer to arrive on the scene, found two spent bullets that he turned over to Hatton and Iniquez later that night (along with a general report form completed by Pfieffer). *Id.*, at 5-8, Pet. App. 21-23. In addition, Pfieffer spoke to Hernandez, who had walked over to Pfieffer while Pfieffer was examining the exterior of the Vasquezes' house. *Id.*, at 6-7, Pet. App. 22. Hernandez, who lived behind the Vasquezes, told Pfieffer that the bullets were probably intended for him because he was having problems with some gang members. *Id.*

Hatton and Iniquez followed up on Pfieffer's initial investigation. The detectives interviewed the Vasquezes and inspected their house. *Id.*, at 9-10, Pet. App. 25. In addition, Hatton and Iniquez interviewed Hernandez. *Id.*,

at 10, Pet. App. 25-26. After returning to the police station, Hatton and Iniquez placed the spent bullets (which they had earlier received from Pfieffer and had temporarily placed in an envelope and put on a clipboard) in Iniquez' desk drawer, which they then locked. *Id.*, at 10-12, Pet. App. 25-27. The detectives then filled out a tour of duty report, which they submitted along with Pfeiffer's general report form, to their superior Lieutenant Baldwin (who also happened to be the head of Internal Affairs), in which the Pfieffer's retrieval of the bullets and the receipt of the bullets from Pfieffer was reported. *Id.* All of this was done because the detectives believed there would be an Internal Affairs investigation and they wanted to make sure that the evidence was preserved and that nothing happened to it.

The bullets remained in Iniquez's desk drawer and the case file remained open until approximately four months later when the F.B.I., the Illinois State Police and the Cook County State's Attorney formed a joint task force to investigate the shooting. *Vasquez v. Hernandez,* 60 F.3d 325, 327 (7th Cir. 1995), Pet. App. 3. The task force produced numerous documents, including additional witness statements, and retrieved physical evidence from Hernandez' yard. *Id.* In addition, the task force conducted various examinations on certain officers' guns with the bullets retrieved and on the weapons of guests at Hernandez's party, and set up a laser trajectory system to determine the path of the bullets. *Id.*

REASONS FOR DENYING THE WRIT OF CERTIORARI

This case presents no important question deserving this Court's review, nor does it present any frequently recurring question as evidenced by the relatively few reported decisions on this subject. Most important, there is no conflict between the Seventh Circuit's decision in this case and the decisions of other Circuit Courts of Appeals. *See Braxton v. United States,* 500 U.S. 344, 347, 111 S. Ct. 1854, 1857 (1991) (a principal purpose for which the United States Supreme Court uses certiorari jurisdiction is to resolve conflicts among the circuits). Finally, the Vasquezes have misstated both the law and the facts. For these reasons, the petition for writ of certiorari should be denied.

I.

THERE IS NO BASIS FOR THE EXERCISE OF CERTIORARI JURISDICTION IN THIS CASE

In its thorough discussion of the right of access issue, the Seventh Circuit affirmed the District Court's grant of summary judgment because it found that, on the uncontradicted evidence, the Vasquezes were not deprived of any constitutional right and that there was, therefore, no violation of 42 U.S.C. Section 1983. *Vasquez v. Hernandez,* 60 F.3d 325, 329 (7th Cir. 1995), Pet. App. 7. Liability on a conspiracy theory pursuant to 42 U.S.C. Section 1983 requires proof of (1) a conspiracy, and (2) an actual deprivation of a constitutional right. *Hampton v. Hanrahan,* 600 F.2d 600, 622-23 (7th Cir. 1979) *reh'g denied,* 448 U.S. 913, 101 S.Ct. 33 (1980) *citing Lesser v. Braniff Airways, Inc.,* 518 F.2d 538, 540 n.2 (7th Cir. 1975). Thus, in order to prevail on their claim that the

Pfieffer Respondents violated Section 1983 by covering up their alleged knowledge of who shot Mrs. Vasquez and thus depriving the Vasquezes of their constitutional right of access to the courts to seek redress from those persons, the Vasquezes were required to prove, *inter alia*, that as a proximate result of the alleged conspiracy, they were in fact deprived of the ability (which they would have had absent the alleged conspiracy) to obtain redress in court for the shooting of Loralee Vasquez. The Seventh Circuit correctly found that, after full discovery, there was no evidence that that was the case. Indeed, as part of the very same case, the plaintiffs *were* suing the people they contend shot Mrs. Vasquez for shooting her, and were armed in that case with massive amounts of evidence compiled by the task force. The Seventh Circuit correctly held that the five-months that elapsed between the day of the shooting and the day on which the plaintiffs filed suit against those whom they contend shot her did not amount to any prejudice. *Vasquez v. Hernandez*, 60 F.3d at 329, Pet. App. 6. The Vasquezes have not been prevented from pursuing their pendent state law tort claims (and indeed filed a complaint in state court after the District Court granted summary judgment in this case on the federal law claims) and the value of such claims has not been reduced at all by the alleged cover-up. *Vasquez v. Hernandez*, 60 F.3d 329, Pet. App. 6-7.

The Vasquezes contend, however, that the Seventh Circuit's decision requires individuals alleging denial of access to courts to demonstrate a total loss of a cause of action, and is thus in conflict with the Fifth Circuit's opinion in *Ryland v. Shapiro*, 708 F.2d 967 (5th Cir. 1983). Furthermore, the Vasquezes argue that such a requirement encourages state actors to conceal wrongful

acts and places an onerous burden on plaintiffs. These arguments do not withstand scrutiny.

A. The Seventh Circuit's Decision Does Not Conflict With The Fifth Circuit's Decision In *Ryland*

The Vasquezes contend that the Seventh Circuit's decision requires a total loss of a cause of action and, thus, is at odds with the Fifth Circuit's decision in *Ryland v. Shapiro*, 708 F.2d 967 (5th Cir. 1983), Pet. 6. The Vasquezes' contention is wrong for two reasons.

First, the Seventh Circuit decision *does not* require a total loss of a cause of action before a constitutional injury will be recognized. What *is* required by the Seventh Circuit's decision (and what is required in all cases, including civil rights cases), is that *some* harm must be demonstrated. *See, infra* pp. 8-9.

> Every plaintiff has the duty of proving that there was a duty owing on the part of the defendant, that defendant breached that duty and as a result plaintiff has been injured. Plaintiffs cannot relieve themselves from these burdens by merely alleging they are being denied their constitutional right of access to courts.

Singer v. Talbot, 595 F. Supp. 188 (D. Utah 1982).

For example, in *Dooley v. Reiss*, 736 F.2d 1392 (9th Cir. 1984), the Ninth Circuit unequivocally held that the plaintiffs had not been deprived of a constitutional right by the defendants' attempt to conceal certain evidence because "the attempt ultimately failed" *Id.* In *Dooley*, the underlying incident was an alleged unlawful search committed by certain police officers. *Id.* The plaintiffs, after wining damages in a jury trial for the unlawful search, sued the defendants alleging that the defendants had

sought to deprive the plaintiffs of the testimony of four potential witnesses in the underlying case. *Id.*, at 1393-94. The witnesses were named in police reports that the defendants delayed in turning over to the plaintiffs. *Id.* The Ninth Circuit concluded that there was no deprivation of a constitutional right because the unlawful search case had "vindicated the plaintiffs' federal rights." *Id.* Thus, even though (unlike here) the delay in *Dooley* arguably prejudiced the plaintiffs inasmuch as, by the time the reports were turned over to the plaintiffs, they were unable to locate the witnesses, the court found no deprivation of constitutional rights because the plaintiffs *were* able to successfully sue those who had wronged them. *Id.* Here, as the Seventh Circuit and the District Court made clear, the Vasquezes have failed to demonstrate *any harm* from the alleged conspiracy on the part of the Pfieffer Respondents. *Vasquez v. Hernandez*,60 F.3d at 329, Pet. App. 6-7; *Vasquez v. Hernandez*, 91 C 4008, slip op. 28-29, Pet. App. 42-43.

Second, the Seventh Court's decision—*that some harm must be demonstrated*—is not at odds with the Fifth Circuit's decision in *Ryland*. *Ryland* did not hold that any and every delay—no matter how brief and whether or not prejudice has occurred—equals constitutional injury. It merely held that the complaint in that particular case stated a cause of action for violation of the plaintiffs' constitutionally protected right to access by alleging that state officers conspired to conceal the murder of their daughter and thus thwarted their ability to bring a wrongful death action. *Ryland v. Shapiro*, 708 F.2d at 973-975. The Fifth Circuit then remanded the case to the District Court for, *inter alia*, a determination as to whether the delay *actually prejudiced* the litigants' right of access. *Id.* In remanding the case, the Fifth Circuit ex-

pressly endorsed the view taken by the Seventh Circuit in this case (*i.e.*, that some prejudice must have occurred in order for there to have been constitutional injury) by noting:

> We have previously held that "if state officers conspire . . . in such a way as to defeat or prejudice a litigant's rights in state court, that would amount to a denial of equal protection of the laws by persons acting under color of state law." Conduct by state officers which results in delay in the prosecution of an action in state court *may* cause such prejudice.

Ryland, 708 F.2d at 974 (Citations omitted, emphasis added.)

That statement is *fully* consistent with the Seventh Circuit's decision here. The Seventh Circuit did not hold that wrongful conduct that delays a plaintiff's ability to bring an action can *never* constitute a deprivation of the right of effective access to the courts. *Vasquez v. Hernandez*, 60 F.3d at 329, Pet. App. 7. Rather, the court affirmed the District Court's holding that here there was no evidence of prejudice due to the delay, and that, therefore, as a matter of law, the Pfieffer Respondents (the investigating officers) did not violate the Vasquezes' constitutional rights. *Vasquez v. Hernandez*, 60 F.3d at 329, Pet. App. 7.

B. There Are No Public Policy Reasons That Demand Review Of The Seventh Circuit's Decision

The Vasquezes' second argument for review of this case is founded upon two public policy arguments or concerns. First, the Vasquezes contend that the Seventh Circuit's decision demands review because it encourages police to

conceal wrongful conduct. Pet. 5, 7, 8. Essentially, the Vasquezes' position is that, if a cover-up succeeds, an officer's initial wrongdoing is buried, and he suffers no harm. If, on the other hand, the cover up fails, he is not liable for the cover-up, but only the initial wrongdoing. Thus, the Vasquezes' claim, the officer risks nothing by covering up his wrongdoing. That is, however, an inaccurate analysis.

The accurate analysis, is that a policy of punishing failed cover-up attempts is hardly likely to deter such attempts; a cover-up is attempted precisely because the officer believes that it will succeed in forever hiding the initial wrongdoing and he will therefore never be punished for anything. If the cover-up fails before any harm has resulted, the officer (if he is the initial wrongdoer) is liable for the initial wrongdoing. If the cover-up is ultimately exposed, but not until after it has succeeded in harming the plaintiff's ability to pursue a claim for the initial wrongdoing (because, for example, an important witness dies before the cover-up is exposed), the officer—who might have won the underlying case (or who might not himself even have been a defendant in the underlying case) then becomes liable for the constitutional deprivation. Thus, under the Seventh Circuit's opinion in this case, there is substantial risk in attempting a cover-up, and thus a substantial deterrent to doing so.

Moreover, a policy of not punishing attempted cover-ups unless some prejudice to the underlying case has resulted encourages officers who have engaged in cover-ups but who subsequently have second thoughts to come forward while the plaintiff can still obtain relief from the wrongdoer. A policy of punishing all attempted cover-ups—no matter how brief and regardless of whether or

not harm has yet come to the plaintiff—would discourage such officers from coming forward, and would in fact encourage them to make further and more extreme efforts to make certain that the cover-up is never exposed and the plaintiff is never able to obtain relief from anyone.

Second, the Vasquezes argue that the Seventh Circuit's decision places an "onerous burden" on plaintiffs by requiring them to demonstrate how they have been prejudiced by the conduct of which they are complaining. Pet. 5, 7. Simply stated, that contention is ridiculous. From the beginning of our legal system, plaintiffs have always been required to demonstrate how they have been harmed by some conduct; conduct without harm is not actionable. Here, both the District Court and the Seventh Circuit found that there was no evidence that the Vasquezes suffered any harm whatsoever as a result of the alleged cover-up. In fact, both courts made special note of the fact that the Vasquezes actually benefitted from filing their case five months after the shooting, rather than filing on the day after the shooting occurred:

> The question then becomes: What is the Constitutional injury here? Plaintiffs claim the alleged conspiracy blocked their access to the courthouse door. Yet Plaintiffs have come to the courthouse equipped with more information and evidence than they would have if they had brought this suit without the efforts of the FBI. The studies conducted by the FBI have revealed not only the direction from which the shots were fired, but also the type of gun which fired the shots and the linkage between certain officer's weapons and the bullets . . . [I]t is rare that a plaintiff has before him the magnitude of arrows in his quiver that the FBI has supplied these Plaintiffs in this case.

Vasquez v. Hernandez, No. 91 C 4008, slip op. at 29, Pet. App. 42-43.

Moreover, by contending that the plaintiffs should not be required to prove how they have been harmed, the Vasquezes are proposing that this Court recognize a brand new standard of liability under the Civil Rights Act—*i.e.*, that unsuccessful attempts to violate a person's civil rights are actionable. Other Circuits, as well as the Seventh Circuit in this case, have correctly held that this is not the law. *Dooley v. Reis, supra.*

C. The Pfieffer Respondents Were Entitled To Summary Judgment For the Additional Reason That There Was No Evidence That They Participated In Any Conspiracy

Finally, the Vasquezes completely misstate the evidence in this case by claiming that "the record in the present case overwhelmingly demonstrates that the Respondents obstructed any *bona fide* investigation of the events leading to the shooting of the Petitioner." Pet. 5-6. That is *far* from the truth. To establish a civil rights conspiracy a plaintiff must establish the existence of a conspiratorial agreement and some overt act in furtherance of the alleged conspiracy. *Hampton v. Hanrahan*, 600 F.2d 600, 621 (7th Cir. 1979). However, in this case the District Court expressly found that there was *no evidence* of the Pfieffer Respondents' participation in any conspiracy:

> The record is void of any evidence of a meeting of the minds or an understanding between the co-conspirators that would suggest that the officers were each willful participants in a scheme to cover-up the shooting.

Vasquez v. Hernandez, No. 91 C 4008, slip op. at 24, Pet. App. 38.

Thus, summary judgment was properly granted in favor of the Pfieffer Respondents because the Vasquezes were required to present some evidence of a civil rights conspiracy and they failed to do so. *Hampton v. Hanrahan*, 600 F.2d 600, 622-23 (7th Cir. 1979). Although the standard for allowing conspiracy cases to go to the jury is fairly liberal because of the nature of conspiracies and of the evidence of them, courts have always required plaintiffs to present *some* evidence up on which a jury could rationally find a conspiracy and here there was none. *See, Simms v. Reiner,* 419 F.Supp. 468, 474 (N.D. Ill. 1976) (summary judgment appropriate where there was no material issue of the existence of a conspiracy).

CONCLUSION

For the foregoing reasons, the Vasquezes' Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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